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No. 89-5867 (8)

In The

Supreme Court of the United States

October Term, 1990

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERAN'S ADMINISTRATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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I. CONGRESS INTENDED THE THIRTY-DAY PERIOD IN 42 U.S.C. § 2000e-16(c) TO BE SUBJECT TO EQUITABLE TOLLING.

A. The "Plain Language" Of § 2000e-16(c) In No Way Indicates That The Thirty-Day Period Is Non-Tollable; Instead Congress Used Language Typically Construed As Equitably Tollable.

This is not a plain language case. Nowhere in § 2000e-16(c) did Congress expressly provide that the 30-day period for filing discrimination suits against federal employers is "jurisdictional." *See* 42 U.S.C. § 2000e-16(c). Nowhere in § 2000e-16(c) or the whole of Title VII did Congress declare that meeting the thirty-day filing requirement is a "mandatory precondition" to the government's waiver of sovereign immunity. And nowhere did Congress state that the thirty-day period is "absolute" or that the filing period is "not subject to tolling in equitable circumstances." The government's "plain meaning" argument reads terms into the statute that are just not there. The only aspect of the provision that is "plain" is that the length of the period is thirty days. Yet, the central issue before the Court is not the *length* of the thirty-day period, but rather the *character* and *jurisdictional significance* of the period, which is far from "plain."

The government's assertion that this is a plain meaning case is betrayed not only by the absence of express statutory terminology, but also by the deep split in the circuits on this issue. Indeed, the vast majority of the circuits have held § 2000e-16(c) non-jurisdictional and tollable. *Johrson v. Burnley*, 887 F.2d 471, 478 (4th Cir. 1989); *Warren v. Department of the Army*, 867 F.2d 1156, 1159 (8th Cir. 1989); *Mondy v. Secretary of the Army*, 845

F.2d 1051, 1054-57 (D.C. Cir. 1988); *Hornsby v. United States Postal Serv.*, 787 F.2d 87, 89 (3rd Cir. 1986); *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Milam v. United States Postal Serv.*, 674 F.2d 860, 862 (11th Cir. 1982). It is somewhat surprising that six federal circuits could have missed or ignored the terms that the government now claims to be so "plain." Moreover, even those circuits that have interpreted § 2000e-16(c) as jurisdictional have not based their decision on the section's plain language. *See, e.g., Cooper v. Bell*, 628 F.2d 1208, 1213, n.10 (9th Cir. 1980) (relying on the overall regulatory scheme); *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 368 (5th Cir.), *cert denied*, 434 U.S. 985 (1977) (relying on legislative history and analogous private sector cases which this Court later overruled in *Zipes* and *Crown, Cork & Seal Co.*).

There are cases where courts have regarded exceptionally emphatic language as a sign of legislative intent that a time limit should be jurisdictional. For example, in *King v. Dole*, 782 F.2d 274, 276 (D.C. Cir. 1986), *cert denied*, 479 U.S. 856 (1987), the D.C. Circuit found the time limit in 5 U.S.C. § 7703(b)(2) jurisdictional, relying on its emphatic character: "notwithstanding any other provision of law, any such case filed . . . must be filed within thirty days. . . . " That same court later noted the contrast between the emphatic language construed in *King* and the language of § 2000e-16(c): "Within thirty days of receipt of notice of final action . . . an employee . . . may file a civil action as provided in Section 2000e-5 of this title. . . . " According to the D.C. Circuit, "the words of § 2000e-16(c) certainly have no special ring." *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1056 (D.C. Cir. 1988).

It is significant that the plain terms of § 2000e-16(c) are no more emphatic or mandatory than the language of other Title VII time limits that this Court has construed as equitably tollable. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). In *Zipes*, this Court ruled that the time limit in 42 U.S.C. § 2000e-5(e) is non-jurisdictional and subject to equitable tolling. 455 U.S. at 398. The terminology in § 2000e-5(e) reads simply: "A charge under this section shall be filed within one-hundred and eighty days after the alleged unlawful employment practice. . . . " If anything, this non-jurisdictional and tollable time limit sounds *more* emphatic than § 2000e-16(c). In *Crown, Cork & Seal Co.*, this Court ruled that the time limit contained in 42 U.S.C. § 2000e-5(f)(1) is also non-jurisdictional and tollable. 462 U.S. at 349 n.9. Again, the language of § 2000e-5(f)(1) – " . . . within ninety days after the giving of such notice a civil action may be brought . . . by the person claiming to be aggrieved. . . . " – is strikingly similar to that contained in § 2000e-16(c). Certainly, § 2000e-16(c) is no more plain, emphatic, or mandatory than § 2000e-5(f)(1).

Although *Zipes* and *Crown, Cork & Seal Co.* both construed time limits for suing private employers, that fact cannot be relevant to the government's "plain language" argument. In any event, the language of § 2000e-16(c) is also analogous to a time limit for suing the federal government which this Court unanimously construed as tollable in *Bowen v. City of New York*, 476 U.S. 467 (1986). *Bowen* involved a suit by the City of New York and certain individuals against the Secretary of Health and Human Services and the Commissioner of the Social

Security Administration pursuant to 42 U.S.C. § 405(g), which provides in part: "Any individual, after any final decision of the Secretary . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision. . . . " Despite the Government's reliance on sovereign immunity, this Court unanimously held that the time limit in § 405(g) was subject to equitable tolling. *Bowen*, 476 U.S. at 478-482. Because the terminology of the § 405(g) time limit for suing the federal government is virtually identical to that used by Congress in § 2000e-16(c), the Court's ruling in Bowen demonstrates at the very least that the present case is not a "plain meaning" case.

The government's reliance on *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), is completely misplaced. First, the sixty-day notice provision at issue in *Hallstrom* was couched in mandatory terms – "No action may be commenced . . . prior to sixty days after the plaintiff has given notice of the violation [to the E.P.A.]. . . . " – and was listed in a subsection of the Act emphatically entitled "Actions prohibited." 42 U.S.C. § 6972(b). More importantly, the Court in *Hallstrom* expressly distinguished *Zipes* on the ground that *Hallstrom*'s sixty-day *waiting* period was of a fundamentally different character than *Zipes' limitation* period, recognizing that limitation periods are "traditionally subject to equitable tolling." 110 S.Ct. at 309. This Court has described equitable tolling as a "traditional" characteristic of limitation periods even when the filing period is contained in legislation authorizing suits against the federal government. *Bowen*, 476 U.S. at 480; *Honda v. Clark*, 386 U.S. 484, 501 (1967).

In sum, if the time limit in § 2000e-16(c) has a "plain meaning," it must be the "traditional" interpretation of limitations periods – i.e., that they are subject to equitable tolling. At a minimum, since time limit terminology similar to § 2000e-16(c) has been construed as tollable in both Title VII cases against private employers – *Zipes* and *Crown, Cork & Seal Co.* – and suits brought against the federal government pursuant to non-Title VII remedial legislation – *Bowen* and *Clark* – the government's argument that § 2000e-16(c) plainly precludes equitable tolling must be rejected.

B. The Language Of The Thirty-Day Filing Period, The Structure Of Title VII, And The Remedial Policies Underlying The Expansion Of Title VII To The Public Sector Demonstrate A Congressional Intent To Create A Time Limit Subject To Equitable Tolling.

The government in this case rests its entire argument upon sovereign immunity, discarding as irrelevant any precedent involving suit against a private sector defendant. Its argument is quite simple: 1) 42 U.S.C. § 2000e-16 is a waiver of the federal government's sovereign immunity; 2) the filing period in § 2000e-16(c) is a condition of that waiver and should be strictly construed; therefore 3) the thirty-day filing period is absolute, and not subject to equitable tolling. The fallacy in the government's position is that it proves too much; according to the government's logic, *any* filing period or time limit in *any* legislation that waives sovereign immunity must, of necessity, be jurisdictional, absolute, and non-tollable.

Such a *per se* approach was expressly rejected by this Court in *Bowen*. 476 U.S. at 479. In *Bowen*, this Court accepted the proposition that 42 U.S.C. § 405(g)'s sixty-day limit for suing the government was a condition of Congress' waiver of sovereign immunity and therefore subject to strict construction. *Id*. It does not automatically follow, however, that such a filing period is absolute, rigid, and non-tollable. *Id*. Instead, the determination of whether a filing period is equitably tollable remains a question of congressional intent. *Id*. As this Court in *Bowen* stated with respect to construing time limits for suing the government, "we must be careful not to 'assume the authority to narrow the waiver that Congress intended' or construe the waiver 'unduly restrictively'." 476 U.S. at 479 (citing, respectively, *United States v. Kubrick*, 444 U.S. 111, 118 (1979) and *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Essentially, the message of *Bowen* is that superficial labels – such as "jurisdictional" or "condition of the government's waiver of sovereign immunity" – do not *per se* resolve the issue of whether a time limitation is absolute or instead subject to equitable tolling. Rather, regardless of whether sovereign immunity is at issue, *Bowen* emphasizes that the issue ultimately turns on whether the doctrine of equitable tolling is consistent with Congress' intent in enacting a particular statutory scheme. 476 U.S. at 479-80. In fact, *Bowen* indicates that a "traditional equitable tolling principle" should be applied if it is "consistent with the overall Congressional purpose" and is "nowhere eschewed by Congress." 476 U.S. at 480 (citing *Honda v. Clark*, 386 U.S. at 501).

In the present case, construing the thirty-day period of § 2000e-16(c) as equitably tollable would be consistent

with congressional intent as evidenced not only by the language and location of subsection 16(c), but also by express Title VII policies, and settled Supreme Court precedent.

1. The Language And Location Of § 2000e-16(c) Reflect A Congressional Intent To Allow Equitable Tolling.

As previously shown in Part IA of this reply, the language of § 2000e-16(c) noticeably lacks emphatic, mandatory terminology. That fact not only undercuts the government's plain meaning argument, it also sheds light on Congress' intent in drafting the provision. The D.C. Circuit found it persuasive that § 2000e-16(c) has "no special ring" and interpreted that as a sign of legislative intent that the thirty-day period should be tollable. *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1055-56 (D.C. Cir. 1988). Congress' use of ordinary, non-emphatic language takes on even greater significance considering this Court's recognition that time limits, such as the one in § 2000e-16(c), are traditionally subject to equitable tolling. *Hallstrom v. Tillamook County*, 110 S.Ct. 304, 309 (1989). This Court has observed this "tradition" even when construing time limits contained in legislation authorizing suit against the federal government. *Bowen v. City of New York*, 476 U.S. 467, 480 (1986); *Honda v. Clark*, 386 U.S. 484, 501 (1967). Congress can certainly be charged with awareness of this "tradition" when it enacted § 2000e-16(c) and chose such ordinary language in drafting the time limit.[1]

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[1] Moreover, this Court has construed time limits strikingly similar to the one in § 2000e-16(c) to be subject to equitable

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Furthermore, this Court in *Zipes* found both the structure of Title VII and the location of a time limit within that structure critical in deciding whether equitable tolling could be applied. 455 U.S. 385, 393-394. Thus, in finding the time limit in § 2000e-5(e) non-jurisdictional and tollable, this Court explained that the provision which specifically conferred jurisdiction on the district courts – § 2000e-5(f)(3) – contained no reference to the timely filing requirement. *Id.* Moreover, *Zipes* emphasized that the time limit construed therein appeared as an entirely separate provision which did not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts. *Id.* at 394. *Zipes'* rationale is clearly applicable to the time limit in § 2000e-16(c). The thirty-day period of § 2000e-16(c) is in a provision separate from the sections governing jurisdiction. *See* 42 U.S.C. §§ 2000e-16 and 2000e-5. Moreover, as noted by the D.C. Circuit in *Mondy*, the cross-reference from § 2000e-16(d) to § 2000e-5(f)-(k) suggests a parallelism between § 2000e-16(c) and § 2000e-5(e), the time limit interpreted as non-jurisdictional and tollable in *Zipes*. *Mondy*, 845 F.2d 1051, 1056 (D.C. Cir. 1988).

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tolling, not only in Title VII suits against private sector employers – *Zipes v. T.W.A.*, 455 U.S. 385 (1982); *Crown, Cork & Seal, Co. v. Parker*, 462 U.S. 345 (1983) – but also in suits brought against the federal government pursuant to other sovereign-immunity-waiving remedial legislation. *Bowen*, 476 U.S. 467; *Honda*, 386 U.S. 484. The specific similarities between § 2000e-16(c) and the provisions involved in *Zipes, Crown, Cork and Seal Co., Bowen*, and *Honda* was addressed in Part IA of this brief and need not be reiterated here.

In sum, Congress' use of non-emphatic language in § 2000e-16(c), the "traditionally" tollable nature of time limits for filing suit, the location of § 2000e-16(c) within the structure of Title VII, and the implied parallelism between § 2000e-16(c) and § 2000e-5(e) sufficiently demonstrate Congress' intent to create a non-jurisdictional, non-absolute, tollable time limit in § 2000e-16(c).

2. A Holding That § 2000e-16(c) Is Tollable Is Most Consistent With Congress' Purposes In Expanding Title VII To Eliminate Discrimination In The Federal Workplace.

As this Court recognized in *Bowen*, legislation that waives sovereign immunity should not be read so narrowly as to defeat Congress' intent in enacting a particular statutory scheme. 476 U.S. 467, 479-80 (1986). The particular statutory scheme in this case is Title VII, remedial legislation that should be liberally construed in favor of parties alleging discriminatory employment practices. *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Craig v. Department of HEW*, 581 F.2d 189, 192 (8th Cir. 1978); *Bell v. Brown*, 557 F.2d 849, 853 (D.C. Cir. 1977).

Liberally construing Title VII not only benefits individual complainants, it also promotes the national commitment to eliminate discrimination. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974); *Martinez*, 738 F.2d at 1110; H.R.Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2157-2159. The legislative history of § 2000e-16 indicates that Congress considered the Federal service to be "an area where equal employment opportunity is of paramount significance." *Id.* at 2157. Recognizing "entrenched

discrimination in the Federal Service," *id.* at 2159, and desiring to completely eradicate such discrimination, the legislative history demands a "vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." *Id.* at 2158.

Such noble motives and high goals are hardly indicative of a grudging waiver of sovereign immunity such that every statutory provision should be strictly construed against those whom the Act was designed to protect. Rather, the historic expansion of Title VII to eradicate discrimination in federal employment – and, specifically, Congress' expressed desire to give federal employees the same rights and remedies as private sector employees – is consistent with a broad waiver of sovereign immunity in order to promote a strong national policy of non-discriminatory practices. Thus, the provisions of § 2000e-16, including the time limit in 16(c), should be construed in the context of a broad waiver of sovereign immunity not a begrudging one. Viewed in this light, it would be anomalous for Congress to erect technical, absolute procedural barriers to be harshly applied regardless of the equities, thereby impeding the very policies that the legislation seeks to promote.

One need look no further than several circuit court cases to see how a rigid, hypertechnical reading of the relatively short thirty-day fuse, irrespective of equities, could undercut Congress' express purposes in waiving the government's sovereign immunity from Title VII plaintiffs. In various cases, Title VII plaintiffs have failed to meet the thirty-day filing requirement because: 1) the thirtieth day fell on a Sunday, thereby preventing the

filing until Monday, the thirty-first day (*Milam v. United States Postal Serv.*, 674 F.2d 860 (11th Cir. 1982)); 2) the plaintiff sued the wrong defendant – the Department instead of the head of the Department – a mistake attributed to ambiguities in the right-to-sue notice (*Warren v. Department of the Army*, 867 F.2d 1156 (8th Cir. 1989)); 3) the plaintiff, because of misleading information in the right-to-sue notice, asked the E.E.O.C. for reconsideration instead of filing suit (*Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984)); and here 4) the plaintiff's attorney was in Korea, on active reserve duty, for most of the thirty-day period, unaware that the clock was running. It is difficult to see how barring suit in these cases, irrespective of the equities, could in any way serve Congress' demand for a vigorous effort to completely eradicate discrimination from Federal employment. One need not have an active imagination to conceive of other inequities that would undercut the policies of Title VII. Of course, under the Government's "absolutist" view, no inequity would be great enough to justify tolling the short fuse.

In an analogous case involving a suit against the federal government pursuant to remedial legislation, where the claimant technically violated a sixty-day limitations period, this Court recognized that a short time fuse on filing suit under remedial legislation is designed not primarily as a shield for the government, but to aid claimants by expediting a final resolution. *Honda v. Clark*, 386 U.S. 484, 495-496 (1967). Thus, the Court in *Clark* ruled that the sixty-day limitation period was subject to equitable tolling, finding that such a result was most consistent with the remedial legislative purpose of the Act. *Id.* at 494-495. The broad remedial purpose of the

1972 Amendments to Title VII suggests a similar interpretation of the extremely short time period in § 2000e-16(c) – i.e., that it was not intended to provide an impenetrable shield for the government, but rather to promote a quick resolution of the status of federal employees, *see Hornsby v. United States Postal Serv.*, 787 F.2d 87, 90 (3rd Cir. 1986), and to provide a quick implementation of corrective action where discrimination is ultimately proved. Such a reading of the thirty-day filing period is far more consistent with Congress' desire to eradicate discrimination in the public sector than is a rigid, inflexible reading of the filing period.

The legislative history of § 2000e-16(c) also supports a "pro-plaintiff" reading of the thirty-day period. When Congress passed the Equal Employment Opportunity Act of 1972, which extended Title VII remedies to public sector employees, it also expanded the time limit in § 2000e-5(e) – the time limit governing E.E.O.C. filings by private sector employees, which this Court held equitably tollable in *Zipes*. In the final Conference Committee analysis of the "new" time limit in § 2000e-5(e), the Committee explained:

> Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection.

118 Cong. Rec. 7166, 7167 (1972).

This congressional awareness of how courts were liberally construing Title VII time limits is instructive as

to Congress' intent in contemporaneously passing a similarly worded time limit in § 2000e-16(c). If Congress had intended the public sector time limit to be narrowly construed in favor of the government – exactly opposite to what Congress recognized was occurring with respect to similar private sector time limits – it is reasonable to expect that they would have chosen a means to do so other than congressional silence.

In sum, this Court's rationale in *Bowen* and *Honda* is fully applicable to this case: application of a traditional equitable tolling principle to the thirty-day requirement of § 2000e-16(c) is fully consistent with the overall congressional purpose in extending Title VII protections to public sector employees, and is nowhere eschewed by Congress.

II. THE THIRTY-DAY PERIOD IN 42 U.S.C. § 2000e-16(c) COMMENCES RUNNING ON THE DATE THE CLAIMANT OR HIS ATTORNEY ACTUALLY RECEIVES THE RIGHT-TO-SUE LETTER.

A. Section 2000e-16(c)'s "Receipt Of Notice" Provision Contemplates Actual Notice To The Claimant.

Although requiring "receipt of notice," the statutory language of 42 U.S.C. § 2000e-16(c) is silent as to whether "receipt" contemplates actual receipt or constructive receipt for purposes of triggering the thirty-day filing period. Where statutory language is ambiguous, courts traditionally have resolved ambiguities in remedial statutes in favor of those whom the legislation was meant to protect. *See Bell v. Brown*, 557 F.2d 849, 853 (D.C. Cir.

1977). Longstanding jurisprudence in this Court has recognized that Title VII is remedial in character and should be liberally construed to promote its purposes. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Liberal reading of Title VII reflects not only the manifest importance of Title VII rights to complaining parties, but also the national commitment to eliminating such discrimination. *Alexander*, 415 U.S. at 45. Indeed, the legislative history of § 2000e-16(c) reveals that Congress' broad commitment to equal employment opportunity is of paramount significance in the federal service area:

> Americans . . . traditionally measure the quality of their democracy by the opportunity they have to participate in governmental processes. It is therefore imperative that equal opportunity be the touchstone of the federal system.

H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2157-58 (1972).

This strong commitment to eliminating discrimination in the federal workplace belies a congressional intention to provide federal employees a judicial remedy that can be forfeited even before an aggrieved employee knows it can be exercised. The better view – and the one in harmony with Title VII's remedial purpose – is that the time provision of § 2000e-16(c) begins running from the date the claimant actually receives the right-to-sue letter. *Craig v. Department of Health, Educ. and Welfare*, 581 F.2d 189 (8th Cir. 1978); *Rea v. Middendorf*, 587 F.2d 4 (6th Cir. 1978); *Bell v. Brown*, 557 F.2d 849 (D.C. Cir. 1977). The issue in this case does not involve merely service of process, or receipt of an offer or acceptance to make a

contract, but rather the interpretation of remedial civil rights legislation. As the D.C. Circuit emphasized, the remedial purpose of Title VII would be poorly served by application of a "constructive receipt" doctrine to the notification procedure of § 2000e-16(c). *Bell v. Brown*, 557 F.2d 849, 856 (D.C. Cir. 1977). This is especially true in view of the short thirty-day time limitation on filing suit. Emphasizing the relatively short amount of time that a claimant has to file suit under § 2000e-16(c), the D.C. Circuit in *Bell* commented that "there would surely be another unintended booby trap if the doctrine of imputed notice were allowed to displace the statutory assumption that the employee will be given notice both personally and actually." 557 F.2d at 957. In other words, allowing constructive notice to trigger such a short time period seems contrary to Congress' overall statutory desire to eradicate discrimination in the federal workplace.

The purpose of the statutory notification is to advise the claimant that his administrative remedies have been exhausted and to inform him that the thirty-day period for filing suit has begun to run. *Coles v. Penny*, 531 F.2d 609, 615 n.15 (D.C. Cir. 1976). That goal obviously has not been accomplished until the claimant is *actually* aware of the suit letter. Moreover, in terms of the policy behind limitations periods generally, the claimant can hardly be deemed to have slept on his rights if, while eagerly awaiting notice that his administrative remedies have been exhausted, the thirty-day period in which to file suit passes without his knowledge.

The government's reliance on *Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962), is misplaced. *Link* merely decided that a federal trial court had the inherent authority to

dismiss a case for failure to prosecute when the plaintiff's lawyer intentionally, and without reasonable excuse, failed to appear at the scheduled pretrial conference. *Id.* at 627-634. Not surprisingly, the Court rejected the argument that a dismissal caused by unexcused attorney conduct imposes an unjust penalty on the client, ruling that a client may be bound by acts of his lawyer-agent. *Id.*, at 633-34. *Link* in no way involved the interpretation of a statute, much less specific statutory language in remedial civil rights legislation. Thus, the government's analogy to *Link* and the concept of "representative litigation" (Res. Br. at 21) fatally neglects the critical question whether, in requiring "receipt of notice," Congress intended the thirty-day clock to commence upon actual receipt of notice by a claimant, which furthers Title VII's remedial purposes, or upon constructive receipt by the claimant's representative, which might unfairly frustrate those purposes.

Moreover, Title VII bottoms its procedural mechanisms on the assumption that often there will be no lawyer to represent the aggrieved employee. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 387 (1982); *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). This is likely to be true at the time when claimants receive their right-to-sue notice from the E.E.O.C. Title VII's contemplation of litigation conducted by laymen demonstrates that when Congress used the phrase "receipt of notice" in § 2000e-16(c), it intended the claimant to receive actual notice.

The government also argues (Resp. Br. at 20) that this Court should construe § 2000e-16(c)'s thirty-day filing period in light of Fed. R. Civ. P. 5(b), which provides that

"[w]henever *under these rules* service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court." (emphasis added). Rule 5(b), however, has nothing whatsoever to do with this Court's interpretation of § 2000e-16(c). First, the Rule itself expressly states that it only applies where service is required or permitted under other Federal Rules of Civil Procedure. Because Congress was aware of Rule 5(b) when it enacted § 2000e-16(c), it is reasonable to assume that Congress believed the rule meant what it says – i.e., that it applies when service is required under the Federal Rules of Civil Procedure, not anytime service or notice is required in any legislation. Moreover, Rule 5(b) provides that service upon an attorney may be made by mailing the service to the attorney's last known address. Congress, however, expressly provided in § 2000e-16(c) that the thirty-day filing period begins from the date of "receipt of notice" rather than "mailing of notice." The distinction is important, for § 2000e-16(c) demonstrates by its own language that it is not subject to the standards of Federal Rule 5(b). Indeed, nowhere in the whole statutory scheme of Title VII did Congress ever expressly or impliedly indicate that notice provisions could be satisfied merely by complying with the Federal Rules of Civil Procedure.

The government's contention that constructive receipt should be applied because it is "easily and objectively determinable" is irrelevant. The only relevant inquiry is what did Congress intend when it enacted § 2000e-16(c). A standard that is easily applied yet frustrates Congress' broad purposes in passing remedial

legislation hardly has much to commend it. A "date of mailing" standard would be very easy to apply but Congress clearly did not adopt it, suggesting that ease of application was not of paramount importance.

B. § 2000e-16(c) Contemplates At Least Actual Notice To The Claimant's Attorney.

Even if this Court's reasoning in *Link v. Wabash R.R.* is applied to § 2000e-16(c)'s notice requirement, Petitioner's attorney did not receive actual notice of the right-to-sue letter until April 10, 1987, and filed this suit in federal district court within thirty days of such receipt. The government, however, proposes that *Link* should be further extended to impute notice to the client from the date that the right-to-sue letter was *delivered* to the attorney's office. While *Link* held that the conduct of an attorney could be imputed to his client in certain circumstances, it plainly did not hold that the conduct of every non-attorney employee could be imputed to the client. *See* 370 U.S. at 634. A client obviously does not make every employee of an attorney his "agent" for purposes of Title VII litigation. The government's position is essentially this: neither the Title VII claimant *nor* his attorney needs actual notice of the right-to-sue before the short thirty-day filing period commences. Notice is imputed from the attorney's employee to the attorney; then, the *constructive notice* of the attorney is imputed to the attorney's client. And despite the remedial purpose of Title VII, the government apparently discerns nothing anomalous about concluding that constructive notice upon constructive notice is "both reasonable and fully consistent with the purpose of Title VII." (Res. Br. at 22). In short,

rather than interpret the language of § 2000e-16(c) in light of *Link*'s theory of "representative litigation," the government urges an interpretation of § 2000e-16(c) in light of its own theory of "representative representative litigation."

The government completely ignores the practical result of its argument. Receipt of a right-to-sue letter by a non-attorney employee – perhaps unfamiliar with the client's case or one who would not even read the letter – leads to an overwhelming risk that a claimant could remain in ignorance of his rights until the time to sue has passed. That danger is reduced significantly, however, if the claimant's attorney has *actual* rather than mere *constructive* notice of the right-to-sue letter. At a minimum, therefore, Congress must have intended that the thirty-day period of limitations set forth in § 2000e-16(c) does not begin to run until the right-to-sue letter is *actually* received by the attorney representing the claimant in the Title VII action.[2]

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[2] The government claims that even if the filing period did not commence running until April 7, when the Petitioner actually received the suit letter, Petitioner's complaint was still untimely because he failed to name the proper defendant in his complaint. (Resp. Br. at 23 n.15). The government's argument improperly assumes that an amendment to Petitioner's complaint to name the proper party would not relate back to the time suit was originally filed.

There seems little doubt that this Court's requirements with respect to relation back in *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986) were fulfilled before the expiration of the thirty-day limitations period. The E.E.O.C. is statutorily required to serve notice of the charge on the employer within ten days of E.E.O.C. filing by the employee. 42 U.S.C. § 2000e-5(e) (1982). Thus, unlike the litigant in an ordinary private action who may

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CONCLUSION

For the foregoing reasons, the rulings below should be reversed and this matter remanded to the United States District Court, Western District of Texas, Waco Division, for trial.

Respectfully submitted,

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first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of a discrimination suit when the charge has been filed with the E.E.O.C. This notice would have provided sufficient warning to the Administration such that it would not be prejudiced in maintaining its defense. Moreover, given the substantial identity of interest existing between the Veteran's Administration and its Administrator, notice of Irwin's suit may be properly imputed to the Administrator. *See Warren v. Department of the Army*, 867 F.2d 1156, 1161 (8th Cir. 1989).

In any event, this Court did not grant certiorari on this issue, and a proper resolution of whether *Schiavone* allows relation back would necessitate a fact-finding hearing on the issue of whether the Administrator had notice of Irwin's suit within the limitations period.